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No. 02-682

IN THE

Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,

Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE UNITED STATES TELECOM ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether this Court's narrow precedents on antitrust duties to deal should be extended to encompass the alleged conduct at issue here where the uniquely comprehensive and detailed regulatory regime established by the Telecommunications Act of 1996 prevents any significant competitive harm and extension of antitrust law would disrupt the implementation and enforcement of that statute.

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The United States Telecom Association ("USTA") respectfully submits this brief as *amicus curiae* in support of Petitioner Verizon Communications Inc., urging reversal of the judgment of the U.S. Court of Appeals for the Second Circuit.[1/]

INTEREST OF AMICUS CURIAE

USTA is the principal trade association for the local telephone industry in the United States. Founded more than a century ago, USTA currently represents more than 600 small, mid-sized, and large local exchange carriers. Collectively, USTA's members operate more than eighty percent of the nation's local access lines. The decision below recognizes a treble-damages cause of action under section 2 of the Sherman Act for claims involving the duties imposed by the Telecommunications Act of 1996 ("1996 Act" or "Act")[2/] on incumbent local exchange carriers to assist their competitors by sharing their facilities. Because many of USTA's members are subject to the extensive sharing requirements of the 1996 Act and the evolving implementation and enforcement of those requirements by the responsible regulatory agencies, this Court's decision will directly affect USTA and its members.

SUMMARY OF ARGUMENT

USTA agrees with petitioner that the Second Circuit erred in interpreting section 2 of the Sherman Act to impose a duty on incumbent local phone companies to provide affirmative assistance to their competitors. USTA writes to

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[1/] This brief was prepared in its entirety by *amicus curiae* and its counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amicus curiae*, its members, and its counsel. By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.

[2/] Pub. L. No. 104-104, 110 Stat. 56 (*codified at* 47 U.S.C. § 151 *et seq.*).

emphasize that, in light of the comprehensiveness of the regulatory regime established by the 1996 Act and its implementing regulations, as well as the enforcement of that regime by federal and state regulators, interpretation of the antitrust laws in this manner is not only inappropriate, but affirmatively harmful.

1. The determination whether to impose antitrust liability must take into account the degree to which a regulatory regime already protects against competitive harm. The regulatory regime under the 1996 Act unambiguously and comprehensively regulates the sharing of incumbent carriers' facilities, and the antitrust laws accordingly should not be extended to do the same. The 1996 Act regime does not simply guard against anticompetitive conduct—the aim of the antitrust laws—but attempts to jump-start new entry by affirmatively obligating incumbent carriers to share their facilities with their competitors. The introduction of a new antitrust cause of action into this regulatory arena would impede the implementation and enforcement of the Act by the agencies Congress entrusted with those tasks.

2. The regulatory regime under the 1996 Act is one of the most comprehensive and complex Congress has ever adopted. The Act imposes detailed obligations on incumbents to share facilities at regulated prices, and it charges the FCC with elaborating those obligations further by rule. In doing so, the FCC must balance the competing statutory objectives of promoting entry based on resale of the incumbent's facilities but also preserving incentives for investment and facilities-based competition. This task has proven to be an enormous and evolving one, requiring prolonged rulemaking proceedings that remain in process to this day. The statute requires incumbents to negotiate sharing agreements with new entrants and empowers state regulatory commissions to resolve disputed issues by arbitration and to establish prices consistently with the discounted pricing methodology prescribed by the FCC. The agreements and arbitrations cover many hundreds of details

of the sharing arrangements between each incumbent and each new entrant. This regime is vigorously enforced by the FCC and state commissions, as the facts of this case demonstrate. The antitrust courts are not suited for this type of comprehensive oversight, and, in any event, the regulatory regime makes it unlikely that any competitive harm could remain undetected or unaddressed for any sustained period of time.

ARGUMENT

I. The Regulatory Regime Created by the 1996 Act Makes Extension of This Court's Narrow Antitrust Duty-to-Deal Precedents to the Alleged Conduct at Issue Both Inappropriate and Harmful.

As petitioner shows, the antitrust laws are *not* implicated by the alleged conduct at issue in this case. This is particularly clear when the antitrust analysis is informed by the fact that such conduct is subject to the uniquely comprehensive and detailed regulatory regime established by the 1996 Act and the FCC's implementing regulations. That regime assures new entrants access to many of the incumbent carriers' facilities and services, thereby eliminating any justification for stretching the antitrust laws to assure such access. In these circumstances, interpreting the antitrust laws either to require additional access or to impose additional penalties for failure to provide access would only interfere with the FCC's and state public utilities commissions' implementation and enforcement of the regulatory regime that Congress devised specifically for the telecommunications industry.

A. The Comprehensive Regulatory Regime Already Protects Against Antitrust Harm.

As petitioner shows, section 2 of the Sherman Act has never been interpreted to impose a duty to deal with or assist

competitors beyond extremely narrow circumstances that are not present here.[3/] The courts have instead determined that "even a monopolist is entitled to compete," and "[p]art of competing like everyone else is the ability to make decisions about with whom and on what terms one will deal."[4/] Thus, courts should use the "utmost caution" when evaluating unilateral conduct under the antitrust laws "lest the law forbid desirable, robust competition[.]"[5/] Courts should be especially hesitant to expand antitrust law to impose affirmative duties on incumbents to share their facilities with competitors, as such duties can actually reduce competition by dissuading competitors from "building facilities [that] benefit consumers"[6/] or otherwise "developing their own alternative inputs."[7/]

In this case, the regulatory regime created by the 1996 Act and its implementing regulations—which, as detailed in Part II below, protect comprehensively against competitive harm—provide further reason that antitrust law should not be extended to impose an affirmative duty on incumbent carriers to assist their competitors. Where an industry is so regulated, this Court has long recognized that the regulatory regime must be taken into account in any analysis of whether antitrust law should be construed to impose liability for specific conduct.[8/] As numerous courts and commentators

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[3/] *See* Brief of Petitioner Verizon at 15-29.

[4/] *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 397 (7th Cir. 2000).

[5/] *Id.*; *see also Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984).

[6/] P. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 851 (1989).

[7/] P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 771(b), at 172 (2d ed. 2002).

[8/] *See, e.g., United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 627 (1974) (courts "must take into account the unique federal and state restraints on [defendant's conduct]. Failure to do so would produce misconceptions that go to the heart of the [antitrust] doctrine itself").

have emphasized:

> Antitrust courts can and do consider the particular circumstances of an industry and therefore adjust their usual rules to the existence, extent, and nature of regulation. Just as the administrative agency must consider the competitive premises of the antitrust laws, the antitrust court must consider the peculiarities of an industry as recognized in a regulatory statute.[9/]

Consideration of the regulatory regime is particularly appropriate in the unique circumstances here. Congress expressly chose to end antitrust court supervision of the telecommunications industry under the AT&T Consent Decree[10/] to eliminate continued stewardship of an entire industry by the courts. Congress instead opted to establish a "national policy framework,"[11/] gave the FCC the responsibility to ensure a competitive environment, and equipped it with an elaborate statutory toolbox to achieve that end. "Compared to its authority under the Communications Act of 1934, the FCC was given a much stronger role under the 1996 Act in regulating the telecommunications industry."[12/]

[9/] *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1106 (7th Cir. 1983) (quoting 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 223d (1978)); *see also Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1990) ("[A]ntitrust analysis must sensitively 'recognize and reflect the distinctive economic and legal setting' of the regulated industry to which it applies.") (quoting Watson & Brunner, *Monopolization by Regulated 'Monopolies': The Search for Substantive Standards*, 22 Antitrust Bull. 559, 565 (1977)).

[10/] Telecommunications Act of 1996 § 601, 47 U.S.C. § 152.

[11/] H.R. Conf. Rep. No. 104-458; 142 Cong. Rec. H1078 (Jan. 31, 1996).

[12/] *Cavalier Tel., LLC v. Verizon Va., Inc.*, No. 02-1337, Slip Op. at 15 (4th Cir. May 20, 2003).

The question here is not whether the regulatory regime establishes *immunity* from antitrust suit. The intricate and extensive regulatory scheme established under the 1996 Act requires incumbent carriers to assist their competitors to a far greater degree than antitrust law requires. "[T]he 1996 Act imposes duties on the [incumbents] that are not found in the antitrust laws. Those duties do not conflict with the antitrust laws either; they are simply more specific and far-reaching obligations that Congress believed would accelerate the development of competitive markets."[13/]

The issue instead is whether the policy of the Sherman Act requires extending section 2 to reach the conduct at issue here. The answer is no. As we show below, the regulatory regime established by the 1996 Act includes robust state and federal enforcement mechanisms that are explicitly designed, and are more than adequate, to protect against the types of competitive harm that respondent's case asserts. This is not a situation in which the regulatory statute has left a vacuum that antitrust law must fill.[14/] To the contrary, the regulatory enforcement mechanisms have been extremely effective. In this case, as detailed in Part II, those mechanisms promptly detected and addressed the alleged misconduct. More generally, the Act has been so effective that the FCC, with advice from the Antitrust Division of the Department of Justice, has found that local telephone markets in New York,

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[13/] *Goldwasser*, 222 F.3d at 401; *see also Cavalier Tel.*, No. 02-1337, Slip Op. at 17 ("By 'jump-starting' and 'accelerating' the creation of competition in the local markets through enactment of §§ 251 and 252 of the Telecommunications Act, Congress imposed more dramatic obligations on the local monopolies than would have been imposed simply by subjecting them to preexisting antitrust liability.").

[14/] Where courts have permitted antitrust actions to proceed against companies that are extensively regulated, the particular conduct that gives rise to the antitrust liability typically has not yet been addressed by federal or state regulators. *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *MCI Communications*, 708 F.2d at 1103.

and in forty other states, have been "fully and irreversibly" opened to competition.[15/] Thousands of sharing agreements have been concluded under the Act,[16/] and competitors now serve over eleven percent of the nation's switched access lines.[17/]

As then-Judge Breyer explained in rejecting an antitrust claim against a regulated utility, "regulation dramatically alters the calculus of antitrust harms and benefits. . . . [R]egulation significantly diminishes the likelihood of major antitrust harm." *Town of Concord*, 915 F.2d. at 17, 25. In this case, the existence of extensive regulatory duties and their enforcement by federal and state regulators significantly reduce the likelihood of antitrust harm and eliminate any justification for stretching antitrust law to reach this case.

B. Expansion of Antitrust Law with Respect to Conduct Regulated under the 1996 Act Would Interfere with Implementation and Enforcement of the Act.

This Court has long recognized that federal agencies "entrusted with regulation in the public interest" must be allowed to "carry out that responsibility free from the

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[15/] *See e.g.*, Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, 3964 ¶ 24 (1999) ("New York 271 Order").

[16/] As of 2000, "[m]ore than 6,000 interconnection agreements ha[d] been signed." News Release, USTA, '96 Telecom Anniversary: At Four Year Mark, Markets Open to Competition, But Local Telcos Still Victims of Regulatory Favoritism (February 7, 2000), *available at* http//www.usta.org/releases/rls00-03.html.

[17/] News Release, *Federal Communications Commission Releases Data on Local Telephone Competition*, Dec. 12, 2002, *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcom1202.pdf (as of June 2002, CLECs served 21.6 million switched access lines).

disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws."[18] And regulated entities "should not be required to act with reference to inconsistent standards of conduct."[19] Expansion of antitrust liability to reach the conduct at issue here would almost certainly generate such disruption and inconsistent standards of conduct: The courts' decisions would interfere with the FCC's and the state agencies' evolving implementation of regulatory policies responsive to the competing goals Congress sought to achieve in the Act.

As explained below, the FCC and state agencies have had to confront and answer myriad issues in implementing the Act's unbundling requirements. The answers the agencies have developed reflect their continued efforts to balance the competing goals of the Act in light of the guidance provided by court rulings,[20] developments in the marketplace, and experience with the success of various regulatory approaches.[21]

Creation of a new antitrust cause of action would require judges and juries to address these same issues under the standards of section 2. The facts of this case illustrate some of the detailed questions that antitrust courts would face: A temporary lapse occurred in the functioning of new software that Bell Atlantic had installed to satisfy a regulatory obligation to give competitors electronic confirmation that

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[18] *United States v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 734 (1975); *see also Otter Tail*, 410 U.S. at 376 (concluding that the antitrust remedy there imposed by the district court did not "conflict with the authority" of the federal regulatory agency).

[19] *Phonetele Inc. v. AT&T Co.*, 664 F.2d 716, 732 (9th Cir. 1981).

[20] *See, e.g., Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *United States Telecom Ass'n ("USTA") v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

[21] *See USTA*, 290 F.3d at 418-422 (recounting the history of the *Local Competition Order*, this Court's *vacatur* of that order, the *UNE Remand Order*, and the *Line Sharing Order*).

their orders had been processed. The complaint asks a court to impose, under the antitrust laws, additional and different remedies beyond those already imposed by the regulators. And this is simply one of countless disputes that arise in connection with the forced sharing of incumbents' facilities. The responsible agencies have prescribed, and are enforcing, many hundreds of similar obligations, performance metrics, and other requirements, which evolve over time. Because antitrust courts lack the industry expertise and detailed statutory guidance that the regulatory agencies possess, courts and the agencies would almost inevitably define the incumbents' particular unbundling duties differently, and the rulings of antitrust courts would be unlikely to mirror or even fit with the determinations made by the responsible agencies.

The result would be greater confusion for industry participants and interference with the regulators' ability to carry out their statutory mandate. If, for example, antitrust law were to be interpreted to treat the 1996 Act's requirements as a floor, with additional sharing obligations to be added piecemeal under section 2, the FCC's (and the states') ability to administer the competing goals dictated by Congress for the telecommunications industry would be impaired. To take just one aspect of the Act's regulatory regime, as described further below, the FCC must apply specific statutory standards in determining which facilities incumbents must share with their competitors. As the courts have made clear, "unbundling is not an unqualified good," and the Act therefore requires the FCC to analyze the "reasonable trade-offs" between any benefits of more unbundling and the "disincentives" to investment that would be created by too much unbundling. *USTA*, 290 F.3d at 425, 429. Thus, an FCC decision *not* to require unbundled access to a particular facility (or to require it only in certain circumstances) reflects a substantive determination that requiring such access (or unlimited access) would be harmful because, for example, it would discourage facilities-based competition or would deter the incumbent's own investment.

If a court nonetheless were to determine in an expansive application of antitrust law that an incumbent *was* required to share that same facility, its decision would impede the regulator's ability to achieve the goals of the statutory scheme. Thus, as the FCC's general counsel has observed, "[i]t's difficult to imagine how a private case getting into this 'essential facilities' issue . . . is not going to bump up quite seriously into what the [FCC] is doing. . . . [U]nquestionably there is going to be a lot of tension."[22]

Even apart from the creation of new or different duties under antitrust laws, the prospect of independent antitrust liability would interfere with regulators' enforcement responsibilities. The FCC and state commissions make complex and nuanced policy decisions in enforcing the duties imposed by the 1996 Act. They must calibrate any penalties and mandatory relief to balance considerations such as how to deter future violations, what effect a particular penalty will have on carriers' incentives, and how best to tailor requirements to promote the goals of the Act. Further, the regulatory agencies must monitor how their enforcement decisions are working in practice, both to ensure a carriers' compliance and to make appropriate adjustments as the marketplace changes. As Congress implicitly recognized in adopting the 1996 Act, antitrust courts are as ill-equipped to do such ongoing remedial fine-tuning as they are to define the underlying sharing duties. As a result, a decision by an antitrust court—even if did not impose a conflicting or new substantive duty—would frustrate the FCC's and state agencies' joint implementation of a single, consistent

[22] Center for Legal Policy at the Manhattan Institute, *The New Class Action Targets: Are Class Actions Undermining Regulations in the Fields of Financial Services, High Technology, and Telecommunications?*, Panel 2: Regulators' Roundtable, p.16, October 30, 2002, *available at* http://www.fed-soc.org/Publications/Transcripts/classactions2.pdf.

enforcement regime under the Act.[23]

Even the threat of independent antitrust liability for conduct regulated by the Act—particularly the threat of treble damages in a class action—could deter incumbents from seeking to resolve issues with the FCC and state agencies regarding such conduct. As in this case, many potential violations of the Act are resolved by the FCC and state agencies. The resulting consent decrees generally provide, again as in this case, that the FCC or the state agency will not pursue further action against the company. If carriers believed that antitrust courts could nonetheless find them liable for the conduct that gave rise to such a decree, they would be far less willing to work with the agencies in resolving concerns or to admit to alleged violations in the decree—a result that would undermine a critical aspect of the regulatory enforcement regime.

In sum, if antitrust law were expanded to reach the conduct here, "[t]he elaborate system of negotiated agreements and enforcement established by the 1996 Act could be brushed aside by any unsatisfied party with the simple act of filing an antitrust action. Court orders in those cases could easily conflict with the obligations the state commissions or the FCC imposes . . . ." *Goldwasser*, 222 F.3d at 401. As a result, "[e]nforcement under the Sherman Act [of violations of the 1996 Act] would effectively collapse enforcement of the Telecommunications Act, leaving only one effective means—the treble damages suit." *Cavalier*, No. 02-1337, Slip Op. at 21.

[23] *See Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 310 (1963) (where regulatory agency had power to "investigate and bring to a halt" anticompetitive practices, "[i]f the courts were to intrude independently [into the regulatory arena of the Civil Aeronautics Act] with their construction of the antitrust laws, two regimes might collide").

II. The 1996 Act Creates a Regulatory Framework That Unambiguously and Comprehensively Addresses Potential Competitive Harm while Carefully Balancing Competing Policy Objectives.

The 1996 Act creates an exhaustive regulatory regime that is designed, among other things, to affirmatively facilitate telecommunications competition and stimulate facilities investment. To that end, the Act creates obligations that go far beyond what the antitrust laws require and establishes regulatory and enforcement mechanisms that render remote the possibility of any unaddressed, cognizable competitive harm.

To jump-start competition in telecommunications, the Act and the FCC's rules adopted under it impose an interlocking scheme of requirements on incumbent local carriers. One of the requirements is that incumbents unbundle their local telephone networks and offer building blocks of the network—so-called unbundled network elements—to their competitors at deeply discounted, regulated prices. The FCC's implementing rules expressly require incumbents to share facilities beyond any that could be considered "essential facilities," as that term has been used in antitrust law. And—as the facts of this case aptly demonstrate—the Act's unbundling requirements are backed up by a detailed and comprehensive state and federal enforcement regime that leaves little room for uncorrected abuse by incumbents.

In implementing and enforcing these new affirmative duties, the FCC strives to balance the competing objectives that Congress sought to achieve in the 1996 Act, such as facilitating new entry while stimulating investment in facilities by both incumbents and new entrants. The task of continuously refining the rules to accommodate changes in the industry has consumed the FCC for over seven years and continues today.

A. The Act Requires Incumbents To Share Their Facilities with Competitors at Regulated, Deeply Discounted Prices.

As the D.C. Circuit observed in *USTA*, "Congress sought to foster competition in the telephone industry, and plainly believed that merely removing affirmative legal obstructions would not do the job." 290 F.3d at 421-422. Instead, Congress moved to foster entry by requiring incumbent carriers to make their facilities and services available to new entrants at regulated prices. As this Court summarized in *Iowa Utilities Board*, an incumbent's duties in this respect are threefold: It must allow competitors to interconnect their facilities to its own; it must provide finished services to competitors for resale, at regulated discounts below retail prices; and it must offer unbundled network elements to competitors at regulated, cost-based prices. *Iowa Utils. Bd.*, 525 U.S. at 371 (citing 47 U.S.C. § 251(c)(2)-(4)); 47 U.S.C. § 252(d)(1). An incumbent also must allow competitors to collocate their facilities in its offices as needed to use the unbundled network elements it provides to them. 47 U.S.C. § 251(c)(6).[24/]

For the largest incumbents, the Bell Operating Companies ("BOCs"), these obligations are also a condition of entry into the long-distance markets in their service areas. *See* 47 U.S.C. § 271. Section 271 of the Act contains a fourteen-point checklist of sharing duties (which incorporate the section 251 duties) that BOCs must fulfill in order to obtain long-distance authorization. 47 U.S.C. § 271(c)(2)(B). Section 271 also includes a "public interest" standard, which the FCC has read to authorize further inquiry into competitive conditions in the local market and the

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[24/] The contours of this obligation have twice been the subject of judicial review. *See GTE Serv. Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000); *Verizon Telephone Cos. v. FCC*, 292 F.3d 903 (D.C. Cir. 2002).

imposition of additional requirements.[25/] Thus, for example, the FCC has read section 271 to authorize it to require incumbents to commit to performance standards relating to their continued compliance with the checklist items, as a means of ensuring that local markets will remain open to competition after long-distance authority is granted. *Id.* at 20659, 20747 ¶¶ 217, 390.

Collectively, these obligations go far beyond a simple prohibition on the incumbent's obstructing competition or abusing market power: They commit incumbents to a whole new line of business they had not voluntarily chosen to enter—wholesaling to competitors at regulated prices. The affirmative obligation to become a supplier to one's competitors has no counterpart under section 2. Whatever validity or scope the "essential facilities" doctrine may have under the antitrust laws, the unbundling obligations under the FCC's rules are expressly broader. The FCC has declared that the unbundling obligations impose "broader dut[ies]" than would the essential facilities doctrine, because "Congress has already created an affirmative obligation for incumbent LECs to make their facilities available to competitors."[26/]

[25/] *See, e.g.*, Memorandum Opinion and Order, *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, 12 FCC Rcd 20543, 20747 ¶¶ 389-90 (1997) (by including the section 271(d)(3) public interest standard, Congress intended that the FCC look beyond the checklist and balance a number of factors in evaluating section 271 applications).

[26/] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3729 ¶ 60 (1999) ("UNE Remand Order"); *USTA*, 290 F.3d at 427 ("we do not intend to suggest that the Act requires use of . . . [the essential facilities] doctrine's criteria").

B. Congress Gave the FCC the Complex and Controversial Balancing Task of Determining the Particulars of the Regulatory Regime To Implement the Act's Sharing Obligations.

Congress entrusted to the FCC the task of determining the particulars of these new affirmative duties in a way that balances the competing objectives of the 1996 Act. With respect to the Act's unbundling obligations, the FCC must determine, first, which elements in the incumbents' networks must be unbundled. The Act requires the agency, in making this determination, to consider at a minimum whether "the failure to provide access to [particular] network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2).[27/]

The FCC has the task of applying that standard in such a way as to strike precisely the right balance between too much and too little unbundling. In the FCC's initial *Local Competition Order*, the agency interpreted the "impair" standard to include *any* lack of access that would "decrease the quality, or increase the financial or administrative cost of the service a requesting carrier seeks to offer, compared with providing that service over other unbundled elements in the incumbent LEC's network."[28/] Applying that standard, the FCC ordered that virtually every part of an incumbent's network be unbundled, in order to stimulate prompt (though not facilities-based) entry by competitors.[29/]

[27/] For proprietary elements, the agency must consider whether access is "necessary" to enable new entrants to compete. 47 U.S.C. § 251(d)(2).

[28/] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15643 ¶ 285 (1996) ("Local Competition Order").

[29/] *Id.* at 15644 ¶ 287 (finding that a more limited approach to unbundling requirements "would inhibit new entry and thus restrict the

That initial effort was ultimately vacated on review in this Court as an overly broad interpretation of the statutory terms. As the Court found, "[s]ince any entrant will request the most efficient network element that the incumbent has to offer, it is hard to imagine when the incumbent's failure to give access to the element would not constitute an 'impairment' under [the FCC's] standard." *Iowa Utils. Bd.*, 525 U.S. at 389. The Court explained that the Act's "necessary and impair" standard is designed to impose a substantive constraint on the FCC's authority to designate network elements for unbundling and stressed that the agency was required to interpret the standard "taking into account the objectives of the Act." *Id.* at 388-89, 392.

On remand, the FCC sought to refine its interpretation of the "necessary and impair" standard to achieve "Congress' objective of promoting rapid competition to all consumers in the local telecommunications market," while following the "directives of the Supreme Court" and "build[ing] on industry experience and technological changes that have occurred in the telecommunications marketplace since the 1996 Act was enacted." *UNE Remand Order* at 3700, 3703-04 ¶¶ 4, 5, 14. The agency concluded that its unbundling determinations should reflect whether a lack of competitive access to network elements would "materially diminish[]" the ability of competitive carriers to offer services, taking into account the availability of alternative facilities and the cost, quality, and ubiquity of such alternatives, among other things. *Id.* at 3730-32 ¶¶ 62, 66. The FCC also recognized that it must consider other "objectives of the Act," including whether or not unbundling of an element would lead to rapid market entry by competitors, promote facilities-based competition and investment, reduce regulatory obligations, promote market certainty, and be administratively practical.

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potential for meaningful competition, which would undermine the procompetitive goals of the 1996 Act").

Id. at 3745-50 ¶¶ 101, 107-116. Under these standards, the agency reaffirmed its decision to require that almost all of the elements it had originally identified be unbundled, *id.* at 3919-20 ¶ 505, and, in subsequent orders, it adopted unbundling requirements for additional elements.[30/]

The FCC's unbundling determinations were again challenged, and the D.C. Circuit held that the balance between too much and too little unbundling had to be refined still further. *USTA*, 290 F.3d at 427-29. The court ruled that the FCC had not accounted for the fact that unbundling "comes at a cost, including disincentives to research and development by both ILECs [incumbent local exchange carriers] and CLECs [competitive local exchange carriers] and the tangled management inherent in shared use of a common resource." *Id.* at 429.[31/]

On remand, the FCC has recently adopted, though it has not yet released, an order amending many of the previously identified unbundling obligations.[32/] In fact, "[r]ecognizing that market conditions . . . change and create a need for commensurate changes to the unbundling rules," the FCC reviews the unbundling requirements on a triennial basis.[33/]

The effort to define an appropriate regulatory balance further requires that regulators accurately set the prices (as well as other terms and conditions) at which incumbents

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[30/] *See, e.g.*, Fourth Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912 (1999) ("Line Sharing Order").

[31/] Although courts have overturned parts of the FCC's rules on several occasions, the rules have remained in effect in some version since 1996.

[32/] *See* Public Notice, FCC Adopts New Rules for Network Unbundling Obligations of Incumbent Local Phone Carriers, CC Docket No. 01-338 (Feb. 20, 2003).

[33/] Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of the Incumbent Local Exchange Carriers*, 16 FCC Rcd 22781, 22782-83 ¶ 1 (2001).

offer the elements they are required to unbundle. The practical impact of the unbundling regime obviously depends heavily on the prices at which network elements are made available. The lower the prices, the more a broad unbundling obligation may discourage investment and efficient facilities-based entry; the higher the prices, the less the unbundling obligation may promote resale-based competition. "[L]ow [network element] prices would not only have the direct effect [of diminishing incentives to invest] but would inherently tend to expand the sphere of these effects." *USTA*, 290 F.3d at 425 n.2. Implementation of the unbundling requirements thus inherently involves decisions not just about what to unbundle, but at what prices.

The Act provides that the prices at which unbundled network elements are offered must be based on the incumbent's costs (including a reasonable profit) of providing the network elements, determined in a manner other than the rate-of-return regulation that prevailed in the traditional monopoly environment. 47 U.S.C. § 252(d)(1)(A)(i). Congress authorized the FCC to prescribe a specific pricing methodology. 47 U.S.C. § 252(d)(1); *see also Iowa Utils. Bd.*, 525 U.S. at 385. The FCC's methodology, which is known as TELRIC,[34] is an attempt to replicate the prices that would prevail in a perfectly competitive marketplace by hypothesizing the forward-looking costs of a most-efficient network that incorporates the best available technology. *Local Competition Order* at 15848-49 ¶ 685. This Court recently upheld the TELRIC methodology, although it found that the agency could reasonably have interpreted section 252 of the Act to allow any number of other costing approaches.[35] Many industry

[34] "TELRIC" stands for "total element long-run incremental cost." *Local Competition Order* at 15844-73 ¶¶ 674-740; *see also* 47 C.F.R. §§ 51.501-51.513.

[35] *Verizon*, 535 U.S. at 500 ("[T]he word 'cost' in § 252(d)(1), as in accounting generally, is a 'chameleon' . . . a 'virtually meaningless' term. [W]ords like 'cost' 'give ratesetting commissions broad methodological leeway; they say little about the method employed to determine a particular rate.'") (quotations omitted).

participants have urged the FCC to reconsider and revise its TELRIC methodology, arguing that a new approach that more closely compensates the incumbents for their actual costs would better serve the 1996 Act's goal of encouraging efficient, facilities-based competition.[36] The agency has indicated that it is open to reexamining its TELRIC rules.[37]

C. The 1996 Act Creates Processes for *Ex Ante* Application of the Sharing Requirements to the Relationships Between Particular Interconnecting Carriers.

The sharing requirements elaborated in the FCC's rules are further implemented through a detailed, statutorily prescribed scheme in which that agency, the states, and the courts each play assigned roles. Rather than rely chiefly on *ex post* enforcement to ensure that incumbents comply with the Act's requirements, Congress instead gave competing carriers a right to trigger, and incumbents an affirmative duty to participate in, a process of negotiation backed by arbitration to define explicitly every specific unbundling commitment the incumbent must make to a particular competitor. That multi-layered process enables carriers to

[36] *See* Letter from Glenn T. Reynolds, Vice President, BellSouth Corporation, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-98 (filed April 28, 2003); Letter from William Daley, President, SBC Communications Inc., to Michael Powell, Chairman, FCC, CC Docket No. 01-338 (filed Sept. 6, 2002); Letter from William P. Barr, Executive Vice President and General Counsel, Verizon Communications, to Michael Powell, Chairman, FCC, CC Docket No. 01-338 (filed July 18, 2002).

[37] *See Local Competition Order* at 15813 ¶ 620 (the FCC will "issue additional guidance" on TELRIC "[i]n the aftermath of the arbitrations and relying on the state experience" in using TELRIC to set actual rates).

have all of their competitive concerns addressed promptly, substantially eliminates the possibility that incumbents can engage in undetected or prolonged noncompliance, and allows for constant recalibration of the contours of the applicable requirements to meet changed circumstances.

New entrants are entitled to secure their rights under the Act and the FCC's rules through written interconnection agreements that they negotiate with incumbents. A competitor who wishes to lease network elements from the incumbent has an explicit statutory right to demand that the incumbent negotiate in good faith to reach an agreement. 47 U.S.C. § 251(c)(1). If the parties reach an agreement, the agreement is subject to approval by a state regulatory commission, which can reject it only if it is discriminatory or inconsistent with the public interest. *Id.* § 252(e)(2)(A). If the parties fail to reach a negotiated agreement, either party may demand arbitration of disputed issues by the state commission, which is empowered to impose a binding interconnection agreement on the parties. *Id.* § 252(b)(1).[38] The state commission must resolve the arbitrated issues within nine months from the date the incumbent received the request for negotiation. *Id.* § 252(b)(4)(C). In resolving the issues, the state commission must apply the FCC's unbundling rules and must fix rates that result from the application of the FCC's TELRIC pricing methodology in the particular instance. *See Iowa Utils. Bd.*, 525 U.S. at 384.

State arbitration proceedings (and related proceedings to implement the 1996 Act) are exhaustive and highly technical and typically require consideration of competing cost models

[38] In the event that a state commission fails to carry out its responsibilities, Congress authorized the FCC to act in the state commission's place, 47 U.S.C. § 252(e)(5); this has occurred rarely. *See* Memorandum Opinion and Order, *Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 15 FCC Rcd 11277 (2000).

as well as voluminous testimony by economic and engineering experts, among others. The state commissions must resolve an extraordinarily detailed list of prices, terms, and conditions for the facilities and services that incumbents must offer in order to meet their obligations under the 1996 Act. For example, the New York Public Service Commission ("PSC") in its most recent arbitration set nine different monthly rates for a network interface device, a small plastic box containing wires that connect a customer's line to distribution plant facilities through a splitter, ranging from $1.09 to $7.35, depending on the type of loop technology and density of the customer's area—and this was just one of many facilities at issue in that case.[39] Similarly, an arbitrating state commission must determine how many minutes are required for (and therefore how much labor cost should be assigned to) each of the numerous tasks necessary to process and provision an order for each element, including, for example, the time needed to drain a manhole of excess water so that a worker can make needed changes to a loop facility. State commissions must also address every relevant non-cost issue the parties have raised. These range from the minutiae of whether the effective date for a new billing rate when a CLEC converts special access service to an enhanced extended link should be the first day of the following month or fifteen days after the order is placed, to the regulatory esoterica of whether a service known as virtual foreign exchange should be classified as local or long distance and what intercarrier compensation regime should apply to such traffic.

Negotiated or arbitrated agreements typically are revised every three-to-four years. The agreements are public, and any competitor may request the same terms that an

[39] *See* Verizon Telephone Operating Companies Effective Tariffs, State of New York, PSC NY NO. 10 (916) Network Elements, *available at* https://retailgateway.bdi.gte.com:1490/cyberdocs.asp?optState=NY.

incumbent has provided to another competitor. 47 U.S.C. § 252(i). In the interconnection agreement or as a condition of section 271 long-distance authority, the state commissions frequently require the incumbent to commit to a detailed "performance assurance plan," obligating the incumbent to offer high quality and timely service to its competitor and imposing penalties for failure to do so. Under these plans and other state regulations, incumbents must report their performance with respect to processing and provisioning CLEC orders to regulators and the CLECs based on numerous different metrics on a monthly basis. Verizon's New York plan has hundreds of metrics, including the average response time, measured to the nearest hundredth of a second, for Verizon's systems to validate electronically the customer address a CLEC submits with its order and the percentage of ordered facilities out of service for four hours, twelve hours, and twenty-four hours.[40/]

As a final measure to ensure proper and thorough implementation of the Act's requirements, Congress dictated that disputes concerning whether the state has properly complied with the Act and the FCC's rules may be brought before the federal district courts. *Id.* § 252(e)(6).[41/] Those courts decide de novo all questions of federal law raised in the challenge, including interpretation of the Act and the FCC's rules.[42/]

[40/] *See* Verizon Performance Assurance Plan, NY PSC Case No. 99-C-0949, *available at* http://www.dps.state.ny.us/Case_99C0949.htm; New York Carrier-to-Carrier Guidelines Performance Standards and Reports, NY PSC Case No. 97-C-0139 (Nov. 2002), *available at* http://www.dps.state.ny.us/ny_c2c_guidelines_11_2002.pdf.

[41/] *See also Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635 (2002) (state commissions are not immune under the Eleventh Amendment to challenges of determinations under section 252 of the Act).

[42/] *See, e.g., Pac. Bell v. Pac-West Telecomms, Inc.*, 325 F.3d 1114, 1123 n.8 (9th Cir. 2003).

D. The Regulatory Regime Includes Explicit and Readily Available *Ex Post* Enforcement Mechanisms.

The Act and the FCC's rules provide enforcement mechanisms that facilitate detection, investigation, and remediation of any violations of the incumbents' sharing duties. Both the FCC and state commissions have specific enforcement authority and have used it actively. This, like the extensive reach of the obligations themselves, reduces the risk of significant or ongoing anticompetitive conduct. And because competitors have every incentive to bring violations to the regulators' attention, there is little chance that misconduct will go undetected.

First, state regulatory commissions have the power to interpret and enforce incumbents' interconnection agreements.[43/] As the courts have recognized, state commissions thus act as "'deputized federal regulator[s]' authorized to exercise regulatory power and ensure compliance with federal law as set out in the [Act]."[44/] The states have actively assumed this role. For example, a state commission recently fined an incumbent carrier $26 million and required it to offer its competitors a ten percent rebate for wholesale services the competitors bought in the last eighteen months, as a sanction for preferential treatment of

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[43/] *See BellSouth Telecomm., Inc. v. MCIMetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1274-76 (11th Cir. 2003) (en banc); *Bell Atlantic-Maryland., Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279, 304 (4th Cir. 2001), *vacated on other grounds sub nom. Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635 (2002); *Southwestern Bell Telephone Co. v. Brooks Fiber Comunications of Okla., Inc.*, 235 F.3d 493, 497 (10th Cir. 2000); *Southwestern Bell Telephone Co. v. Public Util. Comm'n of Texas*, 208 F.3d 475, 479-80 (5th Cir. 2000); *Illinois Bell Telephone Co. v. WorldCom Techs, Inc.*, 179 F.3d 566, 573 (7th Cir. 1999).

[44/] *BellSouth Telecomm., Inc.*, 317 F.3d at 1277-78 (quoting *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 344 (7th Cir. 2000)).

competitors in violation of sections 251 and 252 of the Act.[45] Other carriers likewise have incurred multimillion-dollar penalties for failure to comply with the performance standards adopted by the states under those sections.[46]

Section 271 gives the states additional authority to police the Act's sharing requirements. As noted, many states require a BOC to enter into a performance assurance plan as a predicate for the state's recommendation that the FCC approve the BOC's request for section 271 long-distance authority. These plans typically establish specific performance standards, schedules of penalties for violations, and auditing and accounting procedures, with state commission review of the BOC's performance every six months and a more comprehensive review every three-four years. They provide added assurance that the BOC will continue to satisfy the conditions of long-distance approval—which, as noted, incorporate the section 251 sharing requirements—after entering the long-distance market.[47]

The FCC has its own enforcement powers. Under

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[45] Order Adopting ALJ's Report and Establishing Comment Period Regarding Remedies, *Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements*, Docket No. P-421/C-02-197 at 3, 7 (Minn. Pub. Utils. Comm'n, Nov. 1, 2002).

[46] *See, e.g.*, Order, *Performance Measurements for Telecommunications Interconnection, Unbundling and Resale*, Docket No. 7892-U (Ga. Pub. Serv. Comm'n, Jan. 16, 2001) (fining BellSouth $3.5 million for failing to meet performance standards established by the Georgia commission).

[47] *See, e.g.*, Memorandum Opinion and Order, *Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in New Mexico, Oregon and South Dakota*, WC Docket No. 03-11, FCC 03-81, ¶ 119 (rel. Apr. 15, 2003); Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc. et al. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419, 17487-90 ¶¶ 127-32 (2001).

section 208 of the Communications Act, any person injured by a carrier's violation of any requirement of that statute (as amended by the 1996 Act) or any FCC rule may file a formal complaint with the FCC, which must investigate the complaint and in many cases must resolve it within a specific time. 47 U.S.C. § 208. In adjudicating such complaints, the FCC has the power to award damages, as well as to take other "necessary" enforcement measures. *Id.* §§ 154(i), 206, 209. The FCC has concluded that its section 208 "enforcement authority . . . extends to the local competition provisions of the 1996 Act."[48] Indeed, the agency has specifically ruled that its section 208 authority extends to complaints asserting violations of the sharing requirements of sections 251 and 252[49] or of an interconnection agreement.[50] In the FCC's view, such centralized enforcement of the sharing obligations "enhances enforcement, and competition, by resolving the issues economically, helping to achieve uniform results, and relieving the parties of the burdens of multistate litigation." *Core Communications*, EB-01-MD-017, FCC 03-83 at ¶ 18.

The FCC has additional enforcement powers with respect to incumbents that have received long-distance

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[48] Memorandum Opinion and Order, *Core Communications, Inc. v. SBC Communications, Inc.*, EB-01-MD-017, FCC 03-83, ¶ 17 (rel. Apr. 17, 2003).

[49] *See Local Competition Order* at 15564 ¶ 126 ("Sections 251 and 252 do not divest the Commission of its section 208 authority."); *Core Communications*, EB-01-MD-017, FCC 03-83 at ¶ 14 (the Act "expressly grants the Commission jurisdiction to resolve complaints alleging any violation of the Act"); Memorandum Opinion and Order, *TSR Wireless, LLC v. U S West Communications, Inc.*, 15 FCC Rcd 11166, 11172 ¶ 13 (2000) (Commission has authority to resolve section 208 complaints alleging, *inter alia*, violations of sections 251 and 252), *aff'd on other grounds, Qwest Corp. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

[50] Memorandum Opinion and Order, *Core Communications, Inc. v. Verizon Maryland, Inc.*, File No. EB-01-MD-007, FCC 03-96 (rel. Apr. 23, 2003).

authority under section 271. If at any time such an incumbent "cease[s] to meet any of the conditions required" for approval, the FCC may order the carrier to correct the deficiency, impose a penalty, or revoke or suspend authority to offer long-distance services in that state. 47 U.S.C. § 271(d)(6). The FCC has made clear that it intends to hold incumbents to a high standard of compliance with the conditions on which section 271 authority is granted.[51] The FCC also uses its enforcement authority to conduct regular audits of BOCs' compliance with section 271.[52]

Finally, the FCC has general authority to investigate violations of the Act or its rules on its own initiative and to issue findings and penalties or seek injunctive relief. 47 U.S.C. § 403. The FCC has repeatedly used this power to investigate violations of the Act. It has recently entered into a number of consent decrees with incumbents requiring substantial payments and corrective actions in connection with alleged violations of sections 251 and 271 of the Act.[53]

The Act thus gives both state commissions and the FCC a broad arsenal of enforcement weapons from which to choose. Because competitors and others have strong incentives to invoke these authorities if incumbents fail to meet their obligations, this enforcement regime makes

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[51] *See* Memorandum Opinion and Order, *WorldCom, Inc. v. Verizon New England Inc.*, 17 FCC Rcd 15115, 15128 ¶ 26 (2002) ("WorldCom Order").

[52] *See, e.g.*, *New York 271 Order* at 4174-77, ¶¶ 446-453 (describing the FCC's monitoring of post-entry compliance); *see also* FCC, "Section 271 Enforcement," *available at* http://www.fcc.gov/eb/LoTelComp/-271.html (describing the FCC's 271 Compliance Review Program).

[53] *See, e.g.*, Order, *Qwest Communications International, Inc.*, EB-02-IH-0674, FCC 03-107 (rel. May 7, 2003) ($6.5 million); Order, *Verizon Telephone Companies*, 18 FCC Rcd 3492 (2003) ($5.7 million); Order, *SBC Communications, Inc.*, 17 FCC Rcd 10780 (2002) ($3.6 million).

unlikely any continued, unremedied denials of required access.

E. The Regulatory Regime Thoroughly and Successfully Addressed the Underlying Dispute in This Case, Demonstrating That Antitrust Law Need Not Be Extended To Encompass the Conduct Here.

Both the FCC and the New York PSC investigated the conduct at issue in this case and imposed monetary penalties and future performance requirements on Bell Atlantic to ensure its future compliance with its regulatory obligations. In contrast with cases such as *Otter Tail*, in which courts have permitted antitrust actions where a regulatory agency did not or could not address the alleged competitive harm under the regulatory regime,[54] here the federal and state agencies have addressed and fully remedied the conduct that the respondents allege violated the antitrust laws. Thus, the facts of this case highlight the inappropriateness of recognizing new sharing duties of incumbent carriers under the Sherman Act.

The FCC's Enforcement Bureau began in February 2000 to investigate possible lapses in the operation of Bell Atlantic New York's computerized operating support systems ("OSS") that allegedly resulted in lost or mishandled communications regarding AT&T orders for unbundled elements. Because Bell Atlantic had already received section 271 authority for New York, the FCC proceeded under section 271(d)(6).[55] The investigation promptly led to a consent decree between the FCC and Bell Atlantic in March 2000.[56] Under that decree, Bell Atlantic paid $3

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[54] *See Otter Tail*, 410 U.S. at 375 ("[s]o far as [the alleged antitrust harm] is concerned, there is no authority granted the Commission under Part II of the of the Federal Power Act to order it").

[55] *See* Part II.D *supra* (discussing § 271(d)(6)).

[56] Order, *Bell Atlantic-New York Authorization Under Section 271*

million to the U.S. Treasury and "implemented hardware and software changes, and instituted revised manual and electronic procedures, designed to improve performance in processing orders and timely sending required status notifiers." *See Consent Decree* at 5418-21 ¶¶ 8, 15, 16. The decree required Bell Atlantic to submit weekly performance reports to enable the agency to monitor Bell Atlantic's future OSS performance and prescribed a detailed schedule of additional payments if the carrier did not maintain specified performance levels.[57]

The consent decree stated that it was "a final settlement between BA-NY and the Commission" of the underlying investigation and that the FCC would not use the facts developed in the investigation for any further investigations or proceedings against Bell Atlantic. *Consent Decree* at 5420-21 ¶¶ 13, 17. On June 20, 2000, the FCC announced that Bell Atlantic had satisfied the requirements of the consent decree and that it was no longer required to report its OSS performance to the agency.[58] FCC Chairman Powell has characterized the agency's response to the conduct at issue in this case as "swift and substantial."[59]

The same conduct was also subject to enforcement

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of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, 15 FCC Rcd 5413 (2000) ("Consent Decree").

[57] Measured against specific weekly performance metrics prescribed in the consent decree, Bell Atlantic agreed to make additional payments of $4 million if its aggregate performance fell below 90% for two consecutive weeks, $8 million if its aggregate performance fell below 90% for a third consecutive week, and $12 million if its aggregate performance fell below 90% for a fourth consecutive week. *See Consent Decree* at 5420-21 ¶15.

[58] *See* Press Release, FCC, Enforcement Bureau Announces that Bell Atlantic Has Satisfied Consent Decree Regarding Electronic Ordering Systems in New York (June 20, 2000).

[59] *See WorldCom Order* at 15130-31 (separate statement of chairman Michael K. Powell).

action at the state level. The New York PSC adopted the FCC's OSS performance requirements and imposed *additional* monetary penalties and reporting requirements on Bell Atlantic. In two orders issued in February and March 2000, the state agency described its own investigation of Bell Atlantic's OSS lapses and the subsequent arrangements it had made with Bell Atlantic to resolve the problems.[60] Beginning in February 2000, the New York PSC required Bell Atlantic to submit *daily reports* demonstrating its OSS performance. *See NY PSC Feb. 2000 Order* at 4. When Bell Atlantic failed to resolve its OSS difficulties completely by March 2000, it agreed to provide its competitors $10 million in credits to bills for April 2000. This payment supplemented credits Bell Atlantic was already required to give to competitors under its New York performance assurance plan on account of the lapses. Bell Atlantic also agreed to amend that plan to incorporate the FCC's new OSS performance metrics.

The New York PSC released Bell Atlantic from its daily and weekly reporting requirements in July 2000, finding that the reports showed steady improvement in Bell Atlantic's OSS performance.[61] However, the agency stated that "[s]taff

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[60] Order Directing Improvements to Wholesale Service Performance, *Complaint of MCI WorldCom, Inc against Bell Atlantic-New York concerning Billing Completion Notices, Firm Order Commitments, Acknowledgements and Tracking Numbers*, filed in C 99-C-1529, et al., Case 00-C-0008, et al. (N.Y. Pub. Serv. Comm'n, February 11, 2000) ("NY PSC Feb. 2000 Order"); Order Directing Market Adjustments and Amending Performance Assurance Plan, *Complaint of MCI WorldCom, Inc against Bell Atlantic-New York concerning Billing Completion Notices, Firm Order Commitments, Acknowledgements and Tracking Numbers*, filed in C 99-C-1529, et al., Case 00-C-0008, et al. (N.Y. Pub. Serv. Comm'n, March 23, 2000).

[61] *See* Order Addressing OSS Issues, Complaint of MCI WorldCom, Inc against Bell Atlantic-New York concerning Billing Completion Notices, Firm Order Commitments, Acknowledgements and Tracking Numbers, filed in C 99-C-1529, et al., Case 00-C-0008, et al., at 2 (N.Y.

will continue to follow up on issues related to the OSS to ensure that the order provisioning process continues to improve," and it required Bell Atlantic to provide AT&T with an additional $100,000 in bill credits. *Id.* at 6.

The enforcement actions taken by both the FCC and the NY PSC in this case demonstrate why extension of antitrust law to cover the conduct alleged in this case would be unjustified and would interfere with the regulatory regime. The remedies for Bell Atlantic's shortcomings were extensive and interrelated, including substantial penalties to deter future violations, payments to competitors, and detailed prospective compliance provisions. The agencies acted expeditiously to remedy any competitive harm—the FCC's consent decree was entered the month after the agency began an investigation, speed that an antitrust court could not hope to match. The prospective remedies involved the type of extensive, ongoing monitoring by regulators in which courts could not reasonably engage. The enforcement actions also required close coordination between the FCC and the NY PSC to ensure that the ordered remedies were complementary and consistent.[62/] It could not be clearer that injecting antitrust courts into this enforcement process—and into the implementation and enforcement of the hundreds of other detailed obligations that make up the statutory sharing regime—simply is not justified and would impede the activities of the expert agencies to which Congress entrusted implementation and enforcement of that regime.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

Pub. Serv. Comm'n, July 27, 2000).

[62/] *See Consent Decree* at 5413-14 ¶ 5 ("We have worked closely with the New York PSC on this matter and intend to continue to work closely with it on Bell Atlantic-related section 271 enforcement issues.").

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